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No.

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In the Supreme Court

of the

United States

OCTOBER TERM, 1988

STEVEN RICHARD CHRISTIE,
Petitioner,

vs.

STATE OF HAWAII,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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QUESTIONS PRESENTED FOR REVIEW

1. Was there a denial of the constitutional rights to confrontation and due process when the state failed to provide a representative of the manufacturer as a witness, to establish evidentiary foundation for the Intoxilyzer test result.

2. Does the admission of a test result from an Intoxilyzer, which has not been verified for accuracy in strict compliance with Health Department rules, constitute a violation of due process and equal protection of law.

3. Did the Hawaii Supreme Court violate the separation of powers doctrine by delegating authority, properly vested with the Department of Health, to the manufacturer of the Intoxilyzer, thereby assuming rule-making authority.

4. Are the rules of the State of Hawaii Health Department regarding accuracy verification of the Intoxilyzer unconstitutionally vague and ambiguous, facially and as applied.

5. Are the rules of the State of Hawaii Department of Health overbroad, in violation of due process of law.

LIST OF PARTIES AFFECTED

The parties listed in the caption, and all vehicle drivers in the State of Hawaii, who have been and will be tested with the Intoxilyzer 4011 AS to determine their blood-alcohol level.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Steven Richard Christie, respectfully prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Hawaii in the above case.

OPINIONS BELOW

The decision of the Supreme Court of Hawaii is designated Appendix A in Petitioner's separately filed "Appendix to the Petition for Certiorari" (hereinafter "Appendix"). That decision affirmed the decision of Intermediate Court of Appeals of the State of Hawaii ("ICA"), designated Appendix B in the Appendix. The ICA decision reversed an order of suppression by the District Court of the First Circuit, State of Hawaii, designated Appendix C in the Appendix.

The opinion of the Supreme Court of Hawaii in *State of Hawaii v. Steven Richard Christie*, 70 Haw. ___ (S.C. No. 12438, December 29, 1988), has not as yet been published in the Pacific Reporter. The opinion of the Hawaii Intermediate Court of Appeals is published at 7 Haw. App. ___, 764 P.2d 1245 (1988).

JURISDICTION

The Opinion of the Supreme Court of Hawaii was filed on December 29, 1988. A Motion for Reconsideration was denied on January 17, 1989 (Appendix D). The final Judgment on Appeal was entered on January 18, 1989 (Appendix E). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that

> in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him;

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 291-4 of the *Hawaii Revised Statutes* (hereinafter "*H.R.S.*") in relevant part provides

> **§ 291-4 Driving under influence of intoxicating liquor.** (a) A person commits the offense of driving under the influence of intoxicating liquor if:
>
> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor; or
>
> (2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

Section 321-161, *H.R.S.*, provides

> **§ 321-161 Chemical testing for blood-alcohol concentration.** (a) The department of health shall establish and administer a statewide program relating to chemical testing of blood-alcohol concentrations for the purposes of chapter 286, part VII, and chapters 291 and 291C, with the consultation of the state director of transportation. Under the program, appropriate

procedures shall be established for specifying:

(1) The qualifications of personnel who administer chemical tests used to determine blood-alcohol concentrations;

(2) The procedures for specimen selection, collection, handling, and analysis; and

(3) The manner of reporting and tabulation of the results.

(b) The director of health may adopt rules and regulations pursuant to chapter 91 necessary for the purposes of this section.

RULES INVOLVED

The relevant portions of Chapter 111, Title 11, *Hawaii Administrative Rules, Department of Health*, entitled "Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration," as amended and compiled November 22, 1986 (hereinafter *"Rules"*), which are the subject of this Petition are found in Appendix F.

STATEMENT OF THE CASE

Petitioner was arrested on January 14, 1987, by a Honolulu police officer for the offense of Driving Under the Influence of Intoxicating Liquor ("DUI") in violation of § 291-4(a)(1) and (a)(2), *H.R.S.*. At the police station he was administered a breath test to determine the concentration of alcohol in his blood using a beam attenuator to check the calibration of the Intoxilyzer machine.[1] No accuracy verification test using a reference sample containing a known alcohol concentration

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[1] The accessory denominated a beam attenuator is a circular piece of quartz with an assigned value matched to a particular Intoxilyzer. When it is inserted into the Intoxilyzer into the path of infrared radiation emitted by the light source, the decrease in energy is displayed on the Intoxilyzer and is not related to any measurement of a known concentration of alcohol. There is a lack of uniformity in the accuracy verification testing procedures among the counties of Hawaii. Only the Honolulu Police Department relies on the beam attenuator exclusively, a secondary standard which does not contain alcohol, when performing the accuracy test required by § 11-111-2.1(l) of the *Rules*. Appendix C, at C 9-16.

was performed during the breath test sequence. Appendix C at C 8-9.

Following a hearing in the state district court on Petitioner's "Motion To Suppress Results of Intoxilyzer Test" on the ground that use of the beam attenuator was not in strict compliance with the procedure prescribed in § 11-111-2.1(l) (hereinafter "§ 2.1(l)") of the *Rules*, the court granted the motion, filing a 22-page written Decision making detailed findings of fact and conclusions of law. Appendix C.

Respondent appealed the order of suppression and the case was assigned to the ICA. During oral argument, that court, *sua sponte*, raised the applicability of § 11-111-2.1(j)(3) (hereinafter "§ 2.1(j)(3)") of the *Rules* relating to the "testing for accuracy or calibration of all breath-testing instruments." After supplemental briefing, the ICA construed

the *Rules* to include methods recommended by the manufacturer as an alternative to the accuracy verification test prescribed in § 2.1(l) of the *Rules*. Appendix B, at B 11-14. The ICA concluded that there was evidence in the record "that the beam attenuator is a reliable means of testing the Intoxilyzer for accuracy." *Id.*, at B-15. And since "the performance of an accuracy verification with a beam attenuator is a method recommended by [its] manufacturer[,]" *id.*, the court ruled there was strict compliance with the department's *Rules*... " *Id.*, at B-18.

Petitioner's application for a Writ of Certiorari was granted by the Hawaii Supreme Court, and following further briefing and oral argument that court affirmed the decision of the ICA, concluding that a beam attenuator is a lens and an approved method of accuracy verification. Appendix A. A Motion for

Reconsideration was denied on January 17, 1989, without opinion. Appendix D.

Your Petitioner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

THE HAWAII SUPREME COURT OPINION, HOLDING THAT A BEAM ATTENUATOR IS AN APPROVED METHOD OF ACCURACY VERIFICATION AND IN STRICT COMPLIANCE WITH HEALTH DEPARTMENT RULES, RAISES IMPORTANT CONSTITUTIONAL QUESTIONS REGARDING DUE PROCESS AND EQUAL PROTECTION OF LAW AND THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES.

The admission of breath-testing results at the trial of a person charged with driving under the influence of intoxicating liquor in Hawaii requires the test to be administered in accordance with methods and standards approved by the State Department of Health. *State v. Nakahara*, 5 Haw. App. 575, 704 P.2d 927 (1985). The purpose of the *Rules* is to provide a foundation for the admissibility of the

Intoxilyzer test results. This is constitutionally permissible only if that foundation guarantees the trustworthiness of the test result. *State v. Rolison*, 6 Haw. App. ___ (No. 11413), 733 P.2d 326 (1985).

Following the suppression hearing, the district court concluded that use of a quartz crystal beam attenuator for the accuracy verification test performed during the actual breath-test sequence, instead of using a reference sample of known blood-alcohol concentration, was contrary to and in violation of the controlling § 2.1(l) of the *Rules*.

On appeal, the ICA determined that the district court erred in suppressing the test results because it failed to consider the *Rules* in their entirety and overlooked § 2.1(j)(3), which was interpreted by that court as delegating to the manufacturer the choice of method to be used for accuracy or calibration testing.

Section 2.1(1) makes no reference to a manufacturer's recommended secondary procedure, using the beam attenuator. Instead of determining whether the findings of the district court were supported by the evidence and whether additional facts were required, the ICA raised, for the first time at oral argument, the issue of a manufacturer's recommended procedure as an alternative to the Health Department's specific method of performing the accuracy verification test with a wet-bath test, to wit, using a reference sample of known alcohol concentration.

As a result of raising the applicability of § 2.1(j)(3), the ICA allowed new arguments and facts to be injected into the case without an adequate opportunity for defense counsel to confront and cross-examine a representative of the manufacturer. Two local "experts" testified for the prosecution in district court

as to the use of a beam attenuator.[2] The State failed to provide any representative of the manufacturer who could compare its use, as an accuracy verification test, to the method prescribed in § 2.1(1) of the *Rules*. Nor was a representative of the Department of Health called to testify as to whether the agency was aware of, and considered the effectiveness of, the beam attenuator as a substitute for § 2.1(1)'s wet-bath method.

Without the opportunity to question a manufacturer's representative regarding accessories for the breath-testing machine, the accused is denied due process of law since he or she has no way of determining the validity of the Intoxilyzer test result.

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[2] Milton Hong, a Honolulu police criminalist, and Glen Kobayashi, acting chief of laboratories, Hawaii State Department of Health, testified for the State (Appendix C, C 18-23). Neither State's expert could testify as a representative of the manufacturer without creating a manifest conflict-of-interest dilemma.

In *State v. Lowther*, 7 Haw. App. ___ (No. 11153), 740 P.2d 1017 (1987), the Hawaii Supreme Court indicated that the due process guarantee of a fair trial under the constitutions of both the United States and Hawaii require that "criminal defendants be afforded a meaningful opportunity to present a complete defense," citing *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413, 419 (1984). In the instant case, the Hawaii appellate courts unconstitutionally excluded relevant expert testimony from the manufacturer by not remanding the case to district court for additional evidence and findings.

The right of confrontation is being denied by the State's failure to take steps to allow an accused the opportunity to challenge the rebuttable statutory presumption which arises when the result of the breath test is admitted

into evidence. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.ED.2d 347 (1947); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct, 89 L.Ed.2d 674 (1986). The opportunity to assess these testing procedures and evaluate the results is critical to an accused's case and thus to the integrity of the criminal justice system. An accuracy deviation of just one one-hundredth of a percent can justify suppressing test results that would otherwise be admissible. *See*, § 11-111-2.1(k) (hereinafter "§ 2.1(k)") of the *Rules*. Appendix F at F 9-10.

In addition, there is a violation of equal protection of law because of the lack of uniformity among Hawaii's several counties in conducting the accuracy verification test.

The islands of Maui and Kauai use a reference sample of known alcohol concentration during each test, and the island of Hawaii uses both a wet-bath test and the beam attenuator during each test. Only Honolulu County on the island of Oahu uses the beam attenuator alone, without a wet-bath test, for accuracy testing during each individual test. Appendix C at C-11. The decision by the Hawaii Supreme Court has not solved this problem.

II

THE HAWAII SUPREME COURT DECISION CIRCUMVENTS THE HEALTH DEPARTMENT'S BREATH-TESTING RULES AND VIOLATES DUE PROCESS RIGHTS, AS IT PERMITS A CONVICTION WITHOUT ANY GUARANTEE OF THE TEST RESULT'S VALIDITY.

Having decided that a beam attenuator is a lens,[3] the Hawaii Supreme Court erroneously declares (Appendix A at A-32) that the Intoxilyzer and related accessories have been evaluated and approved by the Department of Health for compliance with §§ 11-111-2.1(a) and 11-111-2.1(d) of the *Rules* (hereinafter "2.1(a)" and "2.1(d)"). Section 2.1(a) prescribes the stringent performance standards the instrument must meet. And at A-33 of Appendix A, the Hawaii Supreme Court makes an

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[3] In reaching its determination that the beam attenuator is a lens, the Hawaii Supreme Court relied upon a tertiary analogous dictionary definition. Appendix A at A 25-26. This conclusion was diametrically opposed to that reached by the district court which found that the beam attenuator was not a lens. Appendix C at C-42.

incorrect assumption when it says "we find it logical to follow what the manufacturer has recommended in testing the accuracy of the Intoxilyzer." The manufacturer's manual does not make any recommendation regarding accuracy verification during the actual testing of a subject.[4] The manufacturer's instructions recommend the beam attenuator as a secondary calibration test rather than an accuracy verification device. Moreover, the Court is under the mistaken impression that the instructions for the operation of the Intoxilyzer machine, namely the 17-step Operational Checklist, designed and utilized by the Honolulu Police Department, have been approved by the Department of Health. (Appendix C at C-8); *State v. Rolison, supra,* at 328.

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[4] Although the Hawaii Supreme Court refers to it, the manufacturer's manual was not made part of the record before the district court. Appendix A at A-11.

The incorporation of the manufacturer's recommended methods for testing accuracy in § 2.1(j)(3) of the *Rules* constitutes an impermissible subdelegation of rule-making authority. The Court is rule-making by interchanging the meaning of the terms "calibration" and "accuracy," and delegating the authority to choose the form of testing to the manufacturer.

Section 2.1(a) of the *Rules* is generic since it applies to all breath-testing instruments.[5] Sections 2.1(k) and 2.1(l) are not written for the beam attenuator; in fact these two subsections refer specifically to the wet-bath solution as a method of calibrating and verifying the accuracy of breath-testing instruments in general. Moreover, there is no evidence that the beam attenuator meets the

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[5] This is evidenced by the definition of "reference sample" (§ 11-111-1 of the *Rules*) which includes ampoule. An ampoule was used for calibration of the Breathalyzer breath-testing machine when it was used in Hawaii.

stringent requirement for accuracy verification as prescribed in § 2.1(a) of the *Rules*.

Due process is violated because the beam attenuator procedure has not met the accuracy verification test requirement set forth in §§ 2.1(a), 2.1(k) and 2.1(l) of the *Rules*. There is nothing in the record provided by the parties that would show the beam attenuator meets the requirements to the degree required by § 2.1(a).[6]

The fact that the Intoxilyzer is functioning mechanically does not necessarily mean that *it is operating accurately." State v. Rolison, supra*, at 329. One of the foundational prerequisites for the admission of the Intoxilyzer

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[6] Section 2.1(a) of the *Rules* provides the backbone for all the *Rules* pertaining to breath-testing instruments. The Court's reliance on § 2.1(j)(3), allowing testing for accuracy or calibration by means recommended by the manufacturer or approved by the department, must still adhere to the standards of accuracy established by § 2.1(a). If this were not so, then there would be no standard of accuracy for any breath-testing instrument.

test result into evidence is a "showing that the testing method is reliable." *People v. Bowers*, ___ Colo. ___, 716 P.2d 471, 473 (1986).

Since the Department of Health has never evaluated and/or approved the beam attenuator, there is no guarantee of the validity of the test results.[7]

III

THE HAWAII SUPREME COURT DECISION USURPS EXECUTIVE POWER, IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE, BY ERRONEOUSLY DELEGATING TO THE MANUFACTURER OF THE INTOXILYZER AUTHORITY WHICH VESTS WITH THE STATE DEPARTMENT OF HEALTH.

The Court's circumvention of the *Rules* by interpreting § 2.1(j)(3) to arbitrarily sub-

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[7] *State v. Tengan*, 67 Haw. 451, 691 P.2d 365 (1984), presupposes that the 4011 AS Intoxilyzer was evaluated by the Department of Health, when in fact the court merely affirmed that public hearings had been held in accordance with *H.R.S.* § 91-3 in adopting the Department of Health *Rules*. The issues raised in this appeal as to the evaluation of the *Rules* and the beam attenuator were not before the Court in *Tengan*.

stitute the manufacturer's recommended secondary calibration test for the accuracy verification established in § 2.1(l) constitutes a judicial usurpation of executive power. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. ___ (Nos. 11238, 11246), 737 P.2d 486 (1987); *Life of the Land v. Land Use Commission*, 63 Haw. 166, 623 P.2d 431 (1981); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d (1968). It violates the separation of powers doctrine by allowing the Court to perform rule-making in an area (breath-testing) which the Legislature delegated to the Department of Health. § 321-161, *H.R.S.* Clearly, allowing the beam attenuator to be used as a standard for accuracy verification, a substantive change in procedure, which is not recommended as such by the manufacturer nor approved by the Department of Health, is the selection of a testing procedure and is rule-making.

State v. Tengan, 67 Haw. 451, 459, 691 P.2d 365 (1984).

At footnote 2, Appendix A at A-11, and again at A 12-13, the Hawaii Supreme Court considered a manufacturer's manual not in evidence below, and therefore outside the record, to conclude that the secondary verification test was recommended.[8]

Moreover, when the *Rules* were being revised in the fall of 1986 by the Department of Health, the Honolulu Prosecutor (and the police department) recommended that the Department of Health put a period after the phrase "reference sample" and eliminate the words "of known alcohol concentration." These agencies knew full well that the Intoxilyzer 4011 AS beam

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[8] The manufacturer's manual, alluded to by the court, describes the beam attenuator as a secondary check in a bi-phasal testing process. The complete verification test requires a first phase, using solutions of a known concentration of ethyl alcohol. As previously discussed, Petitioner was not afforded his Sixth Amendment right of confrontation on this issue.

attenuator accessory was not a "reference sample of a known alcohol concentration." The Health Department refused to do so. Appendix C at C 32-34. Now, the court has done what the Department of Health refused to do. The judicial branch is exercising the powers bestowed on the executive branch by the legislative branch, violating the separation of powers doctrine. *Stop H-3 Association v. State*, 58 Haw. 155, 162, 706 P.2d 446 (1985).

By affirming the ICA's decision, the Hawaii Supreme Court has authorized the courts to make administrative rules, which the executive branch only is empowered to do. To allow judges to make administrative rules is constitutionally infirm.

In addition, the Court's usurpation of the Department of Health's function is a violation of due process of law because the Petitioner in this case, and future DUI arrestees in the

County of Honolulu, will be convicted by a testing procedure that has not been evaluated or approved by the agency. *California v. Trombetta, supra; Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct 451, 74 L.Ed 1107 (1930). The admission of test results which do not meet strict foundational requirements, as previously decided by a series of appellate decisions of this State, is another departure from due process. *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982); *State v. Souza*, 6 Haw. App. ___, 732 P.2d 253 (1987); *State v. Lowther, supra; State v. Nakahara, supra; State v. Rolison, supra.*

IV

THE HEALTH DEPARTMENT'S RULES REGARDING ACCURACY VERIFICATION DENY AN ACCUSED DUE PROCESS OF LAW AS THEY ARE UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS, FACIALLY AND AS APPLIED, AND OVERBROAD

The Department of Health *Rules* are vague and ambiguous as written and applied, and,

therefore, promote inconsistent treatment of the citizens of Hawaii.

As the district court pointed out in the decision below, at Conclusion of Law number 50 (Appendix C at C-50):

> Thus if section 11-111-2.1(1) does not mean only a reference sample which contains a known concentration of alcohol, but rather contemplates either the beam attenuator alone, or the beam attenuator and a wet bath solution as alternative procedures, then it is unconstitutionally vague and ambiguous and thus is violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections V and IV of the Constitution of the State of Hawaii.

See, State v. Kaneakua, 61 Haw. 136, 138, 597 P.2d 490 (1971); *State v. Bryan Kameenui*, 69 Haw. ___ (1988) (S.Ct.Nos. 12347, 12353). See also the seminal case, *State v. Bloss*, 64 Haw. 148, 163, 637 P.2d 1117 (1981); *cert denied* 459 U.S. 824 (1982).

Different accuracy testing procedures are used in each of at least two other counties in Hawaii. It is apparent that the *Rules* are vague and ambiguous in that each county has interpreted them differently. The *Rules*, therefore, fail to provide clear guidelines to the police for procedures to be used for testing the Intoxilyzer for accuracy.

The *Rules*, as written, are overbroad as they are not tailor-made. They fail to insure the accuracy of the Intoxilyzer 4011 AS test results. The *Rules* were written for all breath-testing devices, including those that may be approved in the future. The operation, maintenance, calibration and accuracy of different breath-testing devices vary from one instrument to the other. For example, in *State v. Boehmer*, 1 Haw. App. 44, 613 P.2d 916 (1980), the ICA recognized a margin of error associated with the electronics of the Breath-

alyzer of .0167%. Section 2.1(k) requires the 4011 AS Intoxilyzer to have a margin of error associated with its electronics of no more than .01%.

In drafting rules in which all breath-testing devices were intended to be included, the Department of Health has created regulations which are overbroad, in that they are not specifically applicable to the Intoxilyzer Model 4011 AS. For this reason as well, the accused is denied due process of law.[9]

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[9] These *Rules* have never been evaluated for accuracy as required by § 2.1(c). *See*, Argument II, *supra*.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be GRANTED.

Dated: Honolulu, Hawaii, March 1989.

Respectfully submitted,

ARTHUR E. ROSS
PAUL J. CUNNEY

Counsel for Petitioner

(SEE APPENDICES, FILED SEPARATELY)